

FOREWORD: LORD CAMDEN MEETS FEDERALISM—USING STATE CONSTITUTIONS TO COUNTER FEDERAL ABUSES

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It is a special treat to be with you today as you resume your longstanding conversation about state constitutionalism, a conversation for which this place—Rutgers-Camden School of Law—has justly won renown. I stress *Camden* not merely to distinguish this school from its sibling in Newark, but to remind you of a deep connection between the topic of your longstanding conversation and your location. What, you may ask, is this deep connection? Therein lies my tale.

I. CAMDEN: FROM PERSON TO PLACE TO PRINCIPLES

The Rutgers-Camden School of Law, of course, takes its name from the city in which it sits, but this city in turn takes its name from an eighteenth century Englishman, Lord Camden. Who was this Camden, and why did Americans name this city in his honor? Born Charles Pratt, Lord Camden was a great lawyer, a lover of liberty, and Lord Chief Justice of the Court of Common Pleas.¹ Revolutionary-era Americans adored him, not only because he championed the American cause in great speeches in the late 1760's, but also because he decided two great cases in the mid-1760's: *Wilkes v. Wood*,² and *Entick v. Carrington*.³ Later in my Lecture, I shall have more—much more—to say about *Wilkes* and *Entick*, for I believe that, when closely examined, the principles underlying these eighteenth century English cases suggest remarkable libertarian possibilities for twenty-first century American state constitutionalism.

For now, I simply want to remind you just how central this man, Camden, and these cases, *Wilkes* and *Entick*, were to American patriots in the 1760's and 1770's. We stand now in one city named by citizens of New Jersey in honor of Lord Camden, but let us not forget another major city so

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1. For more on Camden, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1177 & n.209, and sources cited therein.

2. 19 Howell's State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489.

3. 19 Howell's State Trials 1029 (C.P. 1765), 95 Eng. Rep. 807.

named, by citizens of South Carolina, or the beautiful seacoast township of Camden, Maine, whose town seal features a handsome portrait of Lord Camden. Now, I know I am in Phillies country here—and I admit I am a San Francisco Giants fan myself—but I am sure that some of you must follow the Baltimore Orioles, who play their home games in historic Camden Yards. A couple of hours to the northwest of us stands Wilkes-Barre, Pennsylvania, named to honor the plaintiff in *Wilkes v. Wood*. Further south, we find Wilkes County, Georgia, and Wilkes County, North Carolina, also named for the plaintiff. If we look for twentieth-century analogues, perhaps we might think of *Wilkes* and *Entick* as the *Brown v. Board of Education*⁴ of their day; and Lord Chief Justice Camden as the Earl Warren of his era.

What were these cases all about? In a nutshell, various English critics of King George III and his ministers published (often anonymous) pamphlets sharply attacking government policy and policymakers.⁵ High government ministers didn't much like these attacks—some things haven't changed—and so these ministers ordered their henchmen to find out who had authored these pamphlets so that the authors could be prosecuted and punished for their audacity and impertinence. In the *Wilkes* case, the henchmen proceeded to get a general warrant, which purported to authorize them to search the homes or the persons of anyone they liked—to round up the usual anti-government suspects, as it were.⁶ In the *Entick* case, the henchmen got a more narrow warrant, identifying the anti-government publisher John Entick by name, but purporting to authorize a search of even his most private personal papers at home.⁷ John Wilkes and John Entick didn't much like being roused, and having their homes invaded by government bullies—again, some things haven't changed—and so they brought civil trespass suits against the government henchmen, seeking compensatory and punitive damages for the torts committed upon them. And they won—and won big, winning impressive damage awards from civil juries presided over by our Lord Camden.⁸

The structure of these cases was, at least for our purposes here, quite simple. Plaintiffs sued in tort claiming that these searches and seizures

4. 347 U.S. 483 (1954).

5. For more background, see TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-44 (1969); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 875-915 (1985).

6. *Wilkes*, 19 Howell's State Trials 1153, 98 Eng. Rep. 489.

7. *Entick*, 19 Howell's State Trials 1029, 95 Eng. Rep. 807.

8. *Wilkes*, 19 Howell's State Trials at 1168, 98 Eng. Rep. at 499 (1000 pounds); *Entick*, 19 Howell's State Trials at 1036, 95 Eng. Rep. at 811 (300 pounds).

invaded their persons and their property. Defendant government officers, in turn, pointed to the warrants: "Yes," they in effect conceded, "we did in some sense trespass upon plaintiffs' persons and property, but the government authorized us to do so. And government, of course, can often authorize what would otherwise be an actionable tort. If A reaches into B's pocket and takes money from B's wallet, that's ordinarily a tort. But if A does this with governmental authorization, it's okay—it's not trespass, it's taxes." At this point in the argument, plaintiffs in effect replied that the warrants were themselves illegal. These warrants violated the unwritten English Constitution, based on custom, tradition and right reason. No Parliamentary statute explicitly authorized general warrants—warrants lacking probable cause under oath, and particular specification of the person or place to be searched or seized. Similarly, no Parliamentary statutes authorized warrants for private personal papers, like diaries. Plaintiffs argued that these broad warrants violated deep English traditions of privacy and freedom from unreasonable searches.

In his rulings, and his jury instructions, Camden sided with the plaintiffs. The government warrants were illegal, null and void, not worth the paper they were printed on. The defendant officials' defense of government authorization thus collapsed, and they stood as naked tortfeasors liable for both compensatory damages to make Wilkes and Entick whole, and punitive damages to teach arrogant government officialdom a lesson, and to deter similar un-constitutional⁹ conduct in the future.

Now I hope you can begin to see why Revolutionary-era Americans loved this pair of cases, and this man. For they, too, often railed against George III's arrogant ministers. They, too, felt that ministerial policy was violating important traditions of liberty and freedom embodied in an unwritten English Constitution. They, too, loved juries—for American patriots were eligible to serve on a local jury, but were ineligible to serve in, or even vote for, an English Parliament.

How, you might ask, do these cases connect up to the main topics of the longstanding conversation here at Rutgers-Camden School of Law—American federalism and state constitutionalism? That is the question I propose to answer in what remains of this Lecture.

Perhaps the best way to do so is through a series of hypothetical cases building on the principles underlying *Wilkes* and *Entick*.

9. I punctuate this word in this unconventional way to remind us that what was at issue was an unwritten English Constitution, not an American-style written document.

II. LORD CAMDEN MEETS FEDERALISM: STATE REMEDIES FOR FEDERAL WRONGS

The Fourth Amendment was obviously drafted with *Wilkes* and *Entick* centrally in mind.¹⁰ The Amendment's opening clause affirms citizens' rights to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹¹ Note how, in singling out persons, houses, and papers above all other effects, the Amendment focuses precisely on those aspects of the *Wilkes* and *Entick* searches that were so specially intrusive and, on the facts of those cases, unreasonable. The closing clause of the Amendment says that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹² Note that this Amendment does not, contrary to popular belief, *require* warrants for all searches and seizures, or indeed for any search or seizure. Warrants are not *required*, but *limited*: "No Warrants shall issue, but . . ."¹³ Of course, all this makes sense if we keep *Wilkes* and *Entick* centrally in mind. Warrants were friends of the government, not of the citizens searched. Warrants issued by government officials sought to *immunize* government henchmen from subsequent review by citizen juries, and so warrants had to be strictly limited. But if the Amendment doesn't require warrants for all searches and seizures, what does it require? Simply this: that all searches and seizures be *reasonable*.

How was this command to be enforced? Not, as modern courts have suggested, by the so-called exclusionary rule. *Wilkes* and *Entick* were emphatically not exclusionary rule cases. Indeed, England has *never* had an exclusionary rule and no American court for the first hundred years after Independence *ever* excluded evidence on Fourth Amendment grounds. If exclusion was not the remedy, what was? Here too, all we have to do is go back to *Wilkes* and *Entick*. If, in the Founding era, the federal government authorized an outrageous and intrusive search or seizure, the citizen victimized by this intrusion could sue the federal henchmen who carried out the search. In this suit, our American citizen—let's call him John Wilkes Entick—would sue the officers for civil trespass and seek compensatory and

10. For much more documentation and elaboration of the claims in this and the next paragraph, see generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter *Fourth Amendment*].

11. U.S. CONST. amend IV.

12. *Id.*

13. *Id.* (emphasis added).

punitive damages, just as in England. In turn, government officer defendants would plead immunity based on the fact that the federal government had authorized the search or seizure. Then the plaintiff, in turn, would reply that the purported governmental authorization was null and void, because the intrusion was, under the Fourth Amendment, unreasonable and thus unconstitutional. The federal government, John Wilkes Entick would remind the court, had no *power* to authorize unconstitutional searches and seizures; any purported authorization must be ignored, and defendant officers thus stood exposed as naked tortfeasors.

Thus far, the case of our hypothetical American John Wilkes Entick seems to look just like the real cases of the English Wilkes and Entick, with the simple substitution of a written American Constitution for an unwritten English one. That difference, of course, is an important one. In England, judges could rule in favor of ordinary citizens and against government henchmen only in the absence of a clear Parliamentary statute authorizing the government officers' actions. So long as it acted explicitly, Parliament could pass laws abrogating the traditional freedoms of Englishmen, and judges would uphold those laws. In America, by contrast, judges could disregard even explicit Congressional statutes if such statutes violated the freedoms of Americans set forth in a written Constitution and Bill of Rights.

Yet, there remains another more subtle, but for our purposes more important, difference between our hypothetical American case of John Wilkes Entick and its real-life English forbears. England featured a unitary legal system, whereas America structured a federal system, dividing legal authority between state and central governments. Let us now look more closely at our hypothetical American case to see what happens when the lessons of *Entick* and *Wilkes* take root in American soil—when, in effect, Lord Camden meets federalism.

In our hypothetical suit, John Wilkes Entick is suing *federal* officers. In order to prevail in the end, he must show that these officials violated the *federal* Constitution—the Fourth Amendment—and thus lack true governmental immunity. But what law gets J.W. Entick into court in the first place? *Trespass* law, based on property and tort principles typically rooted in *state* law. This state law might take any of several forms. It might simply take shape in common law opinions—and, as *Erie*¹⁴ reminds us, common law of property and tort is typically state law. These principles might also be codified in local ordinances, or in state statutes, or in state constitutions. Whatever their form, these tort and property rules remind us of a dramatic

14. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

but often ignored truth about the Founders' scheme: *state* law could provide citizens with *remedies* against *federal* constitutional violations committed by *federal* agents.

To some this fact may come as shock: "That can't be right! What about the supremacy clause? What about *McCulloch*?¹⁵ What about the Civil War?" I have elsewhere answered these questions in great depth,¹⁶ and so here I shall be brief. Nothing in the Article VI supremacy clause, or in the landmark case of *McCulloch v. Maryland*, or in the spirit of Appomattox and the Civil War Amendments contradicts the dramatic fact of state law remedies for federal constitutional wrongs committed by federal agents. The supremacy clause does not make federal agents supreme, or even Congressional laws supreme. It makes the Constitution itself supreme. When federal agents—even when backed by federal law—violate the federal Constitution, the supremacy clause itself reminds us that these actions are *ultra vires*—not "in pursuance of" the Constitution, in the words of the clause.¹⁷ When federal agents search or seize unconstitutionally, the supremacy clause sides with our J.W. Entick, not against him. So too, in *McCulloch*, Chief Justice Marshall struck down state interference with a federal bank that was wholly lawful—necessary and proper under the federal Constitution.¹⁸ Remember how Marshall structured his analysis. First, he ruled that the bank did indeed fall within the federal government's legitimate powers. Only after deciding this first question did he turn to the second: may a state *nonetheless* tax a federal bank? The clear logic of this overall structure, and of several specific passages in the opinion,¹⁹ suggests that very different principles would have applied to state law interference with an *unconstitutional* federal bank that could not claim bona fide federal immunity. The Civil War, and the Amendments that followed it, reinforced

15. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

16. See Akhil Reed Amar, *Using State Law To Protect Federal Constitutional Rights: Some Questions and Answers About Converse*-1983, 64 U. COLO. L. REV. 159, 163-72 (1993) [hereinafter, *State Law*]. For an earlier exposition, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1492-1519 (1987) [hereinafter *Of Sovereignty*].

17. U.S. CONST. art. VI.

18. *McCulloch*, 17 U.S. (4 Wheat.) 316.

19. See *McCulloch*, 17 U.S. (4 Wheat.) at 425-30 (speaking of "constitutional laws of the Union," "laws made in pursuance of the constitution," "legitimate operations of a supreme government," and of a federal "right . . . to preserve" the bank) (emphasis added). See also *id.* at 427 ("The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.").

the supremacy clause and *McCulloch*, but nowhere freed the federal government from limits of the Constitution itself, limits embodied in clauses like the Fourth Amendment, and in the idea of enumerated power.

Note that in stressing the role of *state law* in countering federal abuses, we have not rejected the centrality of *federal courts*. Although Mr. J.W. Entick might rely on trespass doctrine laid down by prior state court cases, his own case might well be tried in a federal court. In a series of removal statutes adopted in the nineteenth century, Congress provided that damage suits against various categories of federal officers for alleged abuses be removed before trial from state court to federal district court.²⁰ Even if J.W. Entick's case were tried in state court, the case would necessarily travel through federal questions—did the defendants' search or seizure violate the federal Fourth Amendment?—and thus would trigger the Supreme Court's appellate review under the celebrated Section 25 of the Judiciary Act of 1789.²¹ (*McCulloch*, you will no doubt recall, was precisely that kind of case; tried in state court, the case raised federal questions — was the federal bank constitutional? — that triggered Supreme Court appellate review under section 25.).

In admitting that *federal* judges would rule on the federal Constitution in the last instance and—if Congress so desired—at trial, too, have we undercut the importance of *state law* in cases like J.W. Entick's? Not really. For federal judges, too, are obliged to enforce relevant substantive state laws, even in federal question cases. This is required by the Tenth Amendment, by the famous section 34 of the Judiciary Act of 1789—the so-called “Rules of Decision Act”—and by the landmark cases of *Green v. Neal's Lessee*,²² *Murdock v. City of Memphis*,²³ and *Erie v. Tompkins*.²⁴

There is yet another dramatic way that, under the Founders' vision, *state law* would help ease and shape the vindication of *federal* constitutional rights against *federal* officialdom. If, because of removal statutes, our friend J.W. Entick were obliged to try his case in federal court, the Seventh

20. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1057-60 (3d ed. 1988) [hereinafter HART AND WECHSLER].

21. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73. See generally HART AND WECHSLER, *supra* note 20, at 501-21. See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Akhil Reed Amar, *The Two-Tiered Structure of Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

22. 31 U.S. (6 Pet.) 291 (1832).

23. 87 U.S. (20 Wall.) 590 (1875).

24. 304 U.S. 64 (1938). For a thorough discussion of the federalism principles at work here, see HART AND WECHSLER, *supra* note 20, at 521-90, 749, 771-91.

Amendment guaranteed him that his right to a civil jury would be "preserved."²⁵ Remember that in English cases like *Wilkes* and *Entick*, Lord Camden had not acted alone, but had worked in tandem with juries to vindicate the rights of Englishmen. In America, the key Fourth Amendment question turned on the reasonableness of a given search or seizure, and the Framers expected that civil juries, working alongside judges, would breathe life into, and give shape to, this broad standard. "Reasonableness" in tort law, of course, often emerges as an issue of fact, or a mixed issue of law and fact, in which the jury looms large.²⁶ Beyond its role in helping to determine liability, a civil jury would also often decide whether to sock defendants with punitive damages and, if so, where to set the award within a broad range marked out by judges.²⁷ In short, the Founders saw the ideas underlying the Fourth and Seventh Amendments as tightly linked together—a linkage no doubt forged in their minds by the dramatic cases of *Wilkes* and *Entick*. This linkage was perhaps most visible in the Maryland ratifying convention, where a committee recommended a federal constitutional amendment requiring civil jury trial in "all cases of trespasses"—plainly contemplating *government officer* trespasses—and prohibiting appellate relitigation of the jury's factual findings.²⁸

We have already noted how, substantively, the trespass law underlying the Fourth Amendment was *state* law. Now consider this: procedurally, the jury law underlying the Seventh Amendment was, perhaps, also intended to be *state* law. What did the Seventh Amendment mean when it required federal courts to "*preserve*" the right of civil juries, when this right so obviously varied from state to state, and within a single state, also varied over time? Perhaps this: if a state court across the street entertaining a given common law case would use a civil jury, a federal court hearing the same case (say, because of removal) must follow—must "*preserve*"—that state law jury right. In other words, the Seventh Amendment might be a kind of *Erie*-rule for the procedural issue of jury trial, requiring federal courts, at a minimum, to follow state law jury rules.²⁹ This reading snugly squares with

25. U.S. CONST. amend. VII.

26. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-86 (1989); Amar, *Fourth Amendment*, *supra* note 10, at 817-819.

27. See generally Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991).

28. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 550 (Jonathan Elliot ed. 1888). For more documentation of the Fourth Amendment-Seventh Amendment linkage, see Amar, *Fourth Amendment*, *supra* note 10, at 775-78.

29. Federal courts, on this reading, could provide *more* civil juries than state courts

the Federalist Number 83, where Alexander Hamilton described various Anti-Federalist proposals to constitutionalize civil juries as follows: “[Cases] in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the State courts.”³⁰ Although the Supreme Court has never embraced this approach, Hamilton’s understanding draws support from a considerable amount of historical evidence from the Founding era, which I have set out elsewhere.³¹ Compared to the Supreme Court’s current approach—which can charitably be called a muddle—the state-law model is rather easy to apply. A federal court would simply look at the current state law provisions regarding civil juries—provisions embodied in state court cases, state statutes, and, of course, state constitutions.

Structurally, once we recall that *state* law was to provide the substantive cause of action in trespass suits against overreaching federal officials, it makes some sense that *state* law should also be able to guarantee a civil jury. In the converse situation, the modern Supreme Court has held that in certain federal lawsuits in state courts, civil juries are part and parcel of the cause of action and therefore obligatory.³² State law causes of action were at the core of the Seventh Amendment. For the Founders, the two paradigm Seventh Amendment cases were state law trespass suits against federal officers, and diversity cases in contract pitting creditor-state plaintiffs against debtor-state defendants. The Seventh Amendment was crafted around these two foci, and had less bite for causes of action based on federal statutes; a Congress bent on evading civil juries could draft statutes sounding in equity, not law. The centrality of state law cases to the Seventh Amendment also explains why its jury rules were keyed to state practice, whereas the grand jury rules of the Fifth Amendment, and the criminal jury rules of the Sixth Amendment—dealing mainly with suits under federal law—were not.

Here too, the notion that *state* law might play a role in adjudicating *federal* constitutional rights against *federal* officers might come as a shock to some: “That can’t be right! Surely the federal Constitution does not mean

across the street, but never *less*. Thus, Congress would be free to provide for a uniform federal jury rule so long as that rule was at least as protective as the most protective state jury rule. (Anti-Federalists would obviously have liked this incentive scheme.) We should also note that prior to 1938, federal procedure often borrowed from state law; and even today some federal procedural issues are governed by state law, *see, e.g.*, FED. R. CIV. P. 4(k)(1)(A).

30. THE FEDERALIST No. 83, at 504 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

31. See AKHIL REED AMAR, THE CREATION AND RECONSTRUCTION OF THE BILL OF RIGHTS, Chapter Five (forthcoming) (manuscript on file with author).

32. See *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952).

one thing in state A and a different thing in state B. Surely it cannot mean one thing today and a different thing tomorrow. The Constitution lays down a single rule, for all times and all places.”

However, these objections miss a deep and dramatic truth about our federal system. As Henry Hart and Herbert Wechsler proclaimed in a famous passage in their famous casebook on America’s “federal system:”

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states . . . Federal legislation . . . builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the same way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.³³

Here is an example. Copyright law is distinctively federal law; the Constitution explicitly empowers *Congress* to frame nationwide copyright laws in Article I, Section 8, clause 8. Suppose that Congress legislates that, when an author dies, his family should be allowed to renew his copyright, and share in his royalties. But suppose the federal statute does not define who counts as an author’s family. Do illegitimate children count? Adopted children? Divorced spouses? The Supreme Court has told us that, typically, gaps like this in federal law are to be filled by state law, incorporated by reference into a federal scheme.³⁴ Thus, the very same federal copyright statute would, in its application, vary somewhat from state to state and from year to year.³⁵

What is true of federal laws passed by Congress is true of the federal Constitution itself; it too, often incorporates state law by reference, taking on local hues and molding its shape to fit different and changing state law rules. To take an easy case, consider the Just Compensation Clause of the Fifth Amendment. It prevents the federal government from taking private property, for public use, without just compensation.³⁶ But what is property? Property is often—though admittedly not always—a *state* law concept, and

33. HART AND WECHSLER, *supra* note 20, at 533.

34. *See id.* at 564-67; *De Sylva v. Ballentine*, 351 U.S. 570 (1956).

35. *See generally* Paul J. Mishkin, *The Varioussness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

36. U.S. CONST. amend V.

one that changes over time. Thus, the compensation clause will indeed vary from state to state and year to year as the state-law tinged concept of property itself varies.

Indeed, the point goes even deeper. State law not only helps shape the very meaning of certain constitutional clauses that build on state law, but it does so even for constitutional clauses—like the Just Compensation Clause—that limit federal officers themselves. One of the deepest and most important functions of *state* law, and of *state* constitutions, is to help counter abuses of *federal* officialdom.³⁷ This, I fear, is a point that has been lost by many recent celebrations of federalism and state constitutionalism following in the tradition of New Jersey's very own Justice Brennan. In Justice Brennan's famous vision, state judges can use state constitutions to protect state citizens from abuses perpetrated by state governmental officials.³⁸ While his reminder is vitally important, I suggest that it is incomplete. For example, Brennan's vision nowhere explains why Americans are better off with federalism than without it. A critic of federalism might say that federalism merely creates two sets of governments to bully citizens rather than one. Brennan counters that state constitutions can provide rights against states, but of course if these potentially abusive states did not exist in the first place, citizens would not need any state constitutional protections against them.

Thus, we need to supplement Justice Brennan's vision of federalism with Publius's vision, which has recently been embraced by the United States Supreme Court in a series of federalism cases, beginning with *Gregory v. Ashcroft*.³⁹ In this vision, states, state laws, and state constitutions can help protect Americans not merely against state abuses, but against federal abuses, too. In the words of the *Gregory* Court:

Perhaps the principle benefit of the federalist system is a check on abuses of government power Just as the separation and independence of the

37. See generally Amar, *State Law*, *supra* note 16; Amar, *Of Sovereignty*, *supra* note 16.

38. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For a discussion and critique, see Amar, *State Law*, *supra* note 16, at 176-78; Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" In Context*, 47 VAND. L. REV. 1229, 1243-46 (1994) [hereinafter *Five Views*].

39. 501 U.S. 452, 458-59 (1991). See also *New York v. United States*, 505 U.S. 144, 156, (1992); *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995); *id.* at 1638 (Kennedy and O'Connor, JJ., concurring). For a discussion of *Gregory's* vision, see Amar, *Five Views*, *supra* note 38.

coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely "the attempts of the government to establish a tyranny":

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

James Madison made much the same point:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.⁴⁰

Elsewhere, I have tried to trace out in detail the remedial implications that flow from Alexander Hamilton's argument that "state governments" can be the "instrument of redress" when Americans' "rights are invaded by" "the general government."⁴¹ Here, I shall say only a few more words on the matter of state law remedies for federal constitutional rights; then I shall

40. *Gregory*, 501 U.S. at 458-59 (citing THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) and THE FEDERALIST NO. 51, at 323 (James Madison)).

41. See Amar, *Of Sovereignty*, *supra* note 16, at 1492-1519; Amar, *State Law*, *supra* note 16.

have a bit more to say about how state law can be seen as shaping not merely *remedies*, but federal constitutional *rights* themselves.

Our Mr. John Wilkes Entick is of course fictional, but in countless Fourth Amendment cases from the 1790's to the 1970's, real-life Americans did indeed sue federal officers in trespass, and win. In 1971, the Supreme Court handed down its landmark decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁴² a decision that made clear that Americans could sue for damages directly under the Fourth Amendment itself, without the need to plead a state-law trespass. However, *Bivens* did not oust the ancient trespass remedy; it only supplemented it. State-law trespass is now no longer the *only* Fourth Amendment game in town, but for some aggrieved citizens, it might still be the *best* game in town. For what the Supreme Court gave with one hand in *Bivens*, it largely took away with the other hand in later cases creating zones of immunity for government officials.⁴³ So far, these federal judge-made immunities have only been used by the Supreme Court to limit the federal judge-made *Bivens* remedy: what the Supreme Court giveth the Supreme Court can taketh away. The Court has never said that the Constitution requires these immunities— or that these immunities can lawfully oust *state-law* remedies that seek to hold federal officers strictly liable for constitutional violations perpetrated in “good faith.” And because *Bivens* created a national floor, applicable in all 50 states, federal courts may have strictly limited the quantum of damages for reasons that would nevertheless permit a given *state-law* remedy to be more generous than the federal floor. Thus, even after *Bivens* a modern-day J.W. Entick may sometimes prefer state-law remedies to the federal *Bivens* variety. To put the point a different way, federal courts may well award a more generous recovery to a plaintiff with state law on his side than to a plaintiff without.⁴⁴

Here is another example. Imagine that our friend J.W. Entick is driving his car down the highway. With no justification whatsoever, federal officers pull him over, and start rummaging through his glove compartment. In the compartment, they find a very personal, private letter written to Entick by his friend Camden Lord, who also happens to be a passenger in the car. With no justification whatsoever—just for kicks, and to flex their power—the feds proceed to read the letter, mocking passenger Lord for some of the more personal passages. Now suppose that Lord sues under *Bivens*. Although

42. 403 U.S. 388 (1971).

43. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

44. For more discussion of the points highlighted in this paragraph, see Amar, *State Law*, *supra* note 16, at 172-76.

there are no Supreme Court *Bivens* cases precisely on point, the Supreme Court has held, in the exclusionary rule case of *Rakas v. Illinois*,⁴⁵ that car passengers do not have Fourth Amendment standing to challenge car searches, because they lack a "legitimate expectation of privacy in the invaded place."⁴⁶ Perhaps, then, by this logic, only owner Entick could bring a *Bivens* action, but passenger Lord could not.

But wait. Suppose the car search occurred right here in Camden, New Jersey, and New Jersey had a legal rule—in Camden city ordinances, or in state statutes, or in the state Constitution, or in New Jersey case law—that passengers of cars, or writers of letters "owned" by others do indeed have privacy and property rights. Might this New Jersey law give our Mr. Camden Lord "standing" to sue under the Fourth Amendment which he would otherwise lack? Quite possibly yes. In one passage, the *Rakas* Court noted that the passenger in that case had "neither a property nor a possessory interest in the automobile, nor an interest in the property seized."⁴⁷ By contrast, our Mr. Lord could claim a kind of *legal* interest in the letter seized. In another key passage, the *Rakas* Court noted that:

Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of *real or personal property law* or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [T]he Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.⁴⁸

Precisely because of New Jersey law, Camden Lord would argue, he does indeed have a Fourth Amendment interest—a legitimate expectation of privacy—that he might otherwise lack.⁴⁹

45. 439 U.S. 128 (1978).

46. *Id.* at 143.

47. *Id.* at 148.

48. *Id.* at 144 n.12 (emphasis added).

49. As Bob Williams has pointed out to me, the New Jersey Supreme Court has already begun to do what I am calling for here, but has pulled up short. *See State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981) (rejecting *Rakas* and recognizing standing of car passenger to challenge unreasonable search based on New Jersey state constitutional provision echoing, but construed more broadly than, the federal Fourth Amendment). *Alston*, however, involved state officers and New Jersey judges have hesitated to apply its

III. FROM REMEDIES TO RIGHTS

In our last hypothetical, we have shifted gears somewhat. We began with Mr. John Wilkes Entick in the Founding era, using state law as a *remedy* for a (by hypothesis) clear Fourth Amendment violation. But now, with Camden Lord, we are thinking about using state law to confer *standing* for a (by hypothesis) clear Fourth Amendment violation.⁵⁰ Here, too, we might frame the issue as one of additional Fourth Amendment “remedies.” For surely the car search violated owner Entick’s rights. Thus, the argument goes, if state law could give Entick a more generous recovery than he might get with *Bivens* alone, why can’t state law do the same thing for Lord?

From another perspective, “standing” could be seen not as an issue of “remedy” but as one of “right:” were *Lord’s* Fourth Amendment rights violated at all? If not, he has no “right,” and thus deserves no “remedy.” But on this view, the lesson of Lord’s case is that state law can not only help *remedy* a clear Fourth Amendment violation by the feds; it can also help *define* a clear violation in the first place. More boldly still: state law can at times transform what would otherwise be constitutional federal conduct into unconstitutional federal conduct.

To test this formulation, consider yet another hypothetical case involving our imaginary friend, Camden Lord. Lord lives in—where else?—Camden, New Jersey. Every Sunday night he places a dark green trash bag out on his sidewalk for garbage collection early Monday morning. But Lord is a vocal opponent of the federal government, and so the feds don’t like him much. Then, with no good justification, the feds decide to harass Lord by snatching his trash bag early one Monday morning and pawing through it, hoping to find something embarrassing. Outraged, Lord brings a *Bivens* suit. Without more, alas, Lord may well lose. According to the Supreme Court’s opinion in *California v. Greenwood*,⁵¹ a homeowner lacks a legitimate expectation of privacy in his garbage, once he places it out on the sidewalk for trash pick-up. To be sure, *Greenwood* was an exclusionary rule case, and this may have warped the Court’s judgment. Yet the logic of the case leans

logic against federal officers. See, e.g., *State v. Mollica*, 114 N.J. 329, 352, 554 A.2d 1315, 1327 (1989) (search and seizure case declining to apply state constitutional provision to limit federal agents: “Stated simply, state constitutions do not control federal action.”).

50. See Amar, *Of Sovereignty*, *supra* note 16, at 1506, 1511 n.337 (state law can often create legal interests whose violation creates legal injury and thus confers Article III standing).

51. 486 U.S. 35 (1988).

heavily against Lord, in suggesting that citizens have no Fourth Amendment right to protect their garbage; no right, no remedy.

But wait. Suppose Camden, New Jersey has a local ordinance explicitly vesting homeowners with a "privacy" and "property" right in their garbage, vis-a-vis all the world except local trash collectors themselves, who are allowed to pick up trash, but are forbidden to search it. Wouldn't this ordinance *itself* help to give Lord a legitimate expectation of privacy? By the same reasoning, a state statute, or a state court case, or a state constitutional provision could also help to create a legitimate expectation of privacy.⁵² Thus, state law might indeed help to give Lord a Fourth Amendment *right* against federal officialdom that he might otherwise lack.

To be sure, the Court's opinion in *Greenwood*, in one key, but utterly thoughtless passage, rejects the relevance of California law to the federal question at hand.⁵³ Yet it does so in a paragraph that explicitly cites to the *Rakas* language that property law is indeed relevant. Earlier in the *Greenwood* opinion itself, the Court seems to rely on local law to construe the Fourth Amendment, by pointing out that trash collectors themselves are free to search through garbage, or allow the police to do so.⁵⁴ Even if state law is not always dispositive on the federal reasonableness of a search, surely it is *relevant* to whether a given person's "effects" have been searched and to whether that search was "reasonable." So we are left with a sneaking suspicion that *Greenwood* in the end may have been driven more by (sound) doubts about the exclusionary rule than by a proper understanding of Fourth Amendment reasonableness and the structure of our federal Constitution.

Now take this analysis one last step. Suppose no Camden city ordinance, or New Jersey statute or New Jersey case or constitutional clause exists. But suppose that many other states have adopted garbage protection laws. Are not these state laws, at some point, evidence of a national *social* understanding that must inform the meaning of "legitimate expectations of privacy" under the Fourth Amendment? In a similar fashion, the Supreme Court has explicitly consulted state death penalty laws as evidence of

52. In fact, a post-*Greenwood* state court case, construing a state constitutional provision, does exist in New Jersey. See *State v. Hempele*, 120 N.J. 182, 576 A.2d 793 (1990) (holding that, under the New Jersey Constitution, a person does enjoy a reasonable expectation of privacy in his curbside trash bag). The *Hempele* court, however, acted as if this state law ruling had no bearing on the federal Fourth Amendment. See *id.* at 191-95, 798-99. I am indebted to Bob Williams for bringing this case to my attention.

53. *Greenwood*, 486 U.S. at 43-44. Unlike our city of Camden hypothetical, however, California apparently did not purport to vest trash-owners with property and privacy rights vis-a-vis the world.

54. *Id.* at 40.

national social understandings about cruel and unusual punishment within the meaning of the Eighth Amendment.⁵⁵ In this tally of state laws, perhaps state constitutions should count for more than mere state statutes or local ordinances, as constitutions represent deeper and more considered judgments of the people themselves. So here, too, we see how *state* constitutions can help counter *federal* abuses.

IV. CONCLUSION

It might seem as if we have had to stretch the teachings of Lord Camden quite far to make them speak to the topic of state constitutionalism, but I doubt that Camden himself would have thought so. So far as I know, Lord Camden never wrote directly about American federalism, or state constitutionalism. But he wrote a great deal about the need to use law to protect liberty and restrain government abuse. And that, of course, has been one of the great themes of the longstanding conversation about state constitutions here at the Rutgers-Camden School of Law—and, I hope, one of the main themes of my Lecture today.

55. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369-72 (1989). For a more general discussion of this and related techniques, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 590-605 (1993). Note that in *Greenwood* itself, the Supreme Court canvassed state appellate court rulings, implying that such rulings were indeed probative of societal understandings and expectations of privacy. *Greenwood*, 486 U.S. at 41-43 & n.5.

